In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

PAN AMERICAN PETROLEUM CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on December 30, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (App. A, *infra*, pp. 8-12) is reported at 339 F. 2d 694. The opinion and orders of the Federal Power Commission (J.A. 241-250, 259-260)[1] are reported at 30 FPC 1477 and 31 FPC 241.

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[1] "J.A." refers to the joint appendix below.

JURISDICTION

The judgment of the court of appeals setting aside the Commission's order was entered on December 30, 1964 (App. B, *infra*, p. 13). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717 r(b).

QUESTION PRESENTED

Whether the sale of a leasehold interest in proven natural gas reserves to an interstate pipeline company for use by the pipeline company in supplying its interstate markets constitutes a sale of "natural gas" subject to the jurisdiction of the Federal Power Commission.

STATUTE INVOLVED

The Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717-717w, provides in pertinent part:

> Sec. 1(b). The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT

This case involves the jurisdictional status, under Section 1(b) of the Natural Gas Act, of the sale of proven natural gas reserves in the Bastian Bay Field in Louisiana to Tennessee Gas Transmission Company, an interstate pipeline, for use in supplying its interstate markets. It was initiated by a Commission order directing Pan American Petroleum Corporation to show cause why it should not be found to be engaged in the jurisdictional sale of gas in Bastian Bay to Tennessee without statutory authorization (J.A. 211-213).

The underlying facts are as follows: From 1954 through 1959, Pan American acquired twelve oil, gas and mineral leases of undeveloped acreage in the Bastian Bay Field in Plaquemines Parish, Louisiana. In 1955, Pan American drilled an exploratory well on one of the leases, discovering a number of productive sand zones. Thereafter, it drilled a total of 32 wells on six leases, encountering only five dry holes. By December 1960, all of the acreage covered by the leases had been proven, though no sales had yet been made. (J.A. 217.)

On December 1, 1960, Pan American and Tennessee consummated a "Lease Sale Agreement" and an "Assignment and Conveyance," whereby Pan American purported to convey to Tennessee its rights in the twelve leases, together with its wells, equipment and related personal property, for a total price of $159,463,500. Tennessee paid $9,427,104 at the time the transaction was closed and agreed to pay the balance

in seventeen annual installments. The contract provided for a redetermination of the reserves upon the request of either party between 1969 and 1973, and for the adjustment of the purchase price on the basis of such redetermination. The pricing formula was designed to yield a price of 21 cents per Mcf (App. A, *infra*, p. 10). Tennessee agreed to develop and operate the properties and was required to negotiate satisfactory agreements for the purchase of existing royalty interests in the leases.[2] (App. A, *infra*, p. 10, J.A. 217-219)

The assignment of leases was subject to certain reservations. Pan American (1) retained its rights in minerals other than natural gas, oil, and other petroleum liquids; (2) retained its rights in the leases below the bottom of the deepest presently known productive horizons; (3) reserved, as a production payment, all proceeds received by Tennessee from the sale of oil produced on the leased acreage, such payments to terminate when 85 percent of the recoverable reserves have been produced; (4) reserved a similar production payment for proceeds received by Tennessee from the sales of separator liquids,[3] with detailed

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[2] The royalty portion of the gas is more than 25 percent of the total volume Tennessee will receive from the leases. Tennessee negotiated contracts with the owners of the royalty interests agreeing to pay royalties from 1960 to January 1, 1962, at 22.5¢ per Mcf, and at 25¢ per Mcf thereafter; and to make reimbursement for the Louisiana severance tax of 2.3¢ per Mcf (J.A. 219).

[3] Defined in the assignment as "[a]ll liquid hydrocarbons produced from a well classified as a gas well by the Louisiana

provisions relating to the deduction of Tennessee's costs and expenses; and (5) retained the right to process all gas produced from the assigned leaseholds (including that attributable to royalty interests) for the recovery of natural-gas liquids,[4] agreeing to pay Tennessee 21 cents per Mcf for plant losses and use of gas as fuel (App. A, *infra*, p. 10, J.A. 98-110, 218-219).

At the conclusion of the hearing, the trial examiner found that the transaction was a sale of gas in interstate commerce for resale (J.A. 228-237). The Commission, concluding that the case was essentially the same as *Texas Eastern Transmission Corp.*, 29 FPC 249, subsequently set aside *sub nom. M. H. Marr* v. *Federal Power Commission*, 336 F. 2d 320 (C.A. 5), certiorari granted, January 18, 1965, Nos. 644, 693, this Term, adopted the examiner's findings and conclusion. The court below set aside the Commission's determination. It found, as had the Commission, that the contractual provisions were indistinguishable from those considered by the Fifth Circuit in the *Marr* case, *supra*, but concluded, as had the Fifth Circuit in *Marr*, that the transaction was not subject to the Commission's jurisdiction.

Department of Conservation or other regulatory body having jurisdiction in the premises and recovered by the Separator Liquid Recovery Facilities" (J.A. 99).

[4] Defined in the assignment as "[a]ll ethane and heavier liquid and liquefiable hydrocarbons not defined as oil or separator liquids * * *" (J.A. 99).

REASON FOR GRANTING THE WRIT

This case presents the same question as to the scope of the Power Commission's jurisdiction over "the sale in interstate commerce of natural gas for resale" as is presented in *United Gas Improvement Co.* v. *Continental Oil Co., et al.*, and *Federal Power Commission* v. *M. H. Marr, et al.*, Nos. 644 and 693, this Term, in which certiorari was granted on January 18, 1965.[8] That question is whether the sale of a leasehold interest in proven natural gas reserves to an interstate pipeline company constitutes a sale of natural gas subject to Commission jurisdiction. For the reasons set forth in our brief in *Marr*, we believe that the decision below should also be reversed. However, since the issue is fully presented in Nos. 644 and 693, which will soon be ready for argument, we suggest that the Court hold the present petition pending its disposition of those cases.

[8] In our petition in No. 693, filed November 16, 1964, we noted that (pp. 15, 19) this case was awaiting decision by the Tenth Circuit. Copies of the subsequent Tenth Circuit opinion were furnished to the Court by respondents in Nos. 644 and 693 prior to the grant of the petitions.

CONCLUSION

For these reasons, disposition of this petition should await and abide the Court's decision in Nos. 644 and 693.

Respectfully submitted,

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MARCH 1965.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term, 1964

No. 7659

PAN AMERICAN PETROLEUM CORPORATION,
PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
PENNSYLVANIA PUBLIC UTILITY COMMISSION and THE COMMONWEALTH OF PENNSYLVANIA, INTERVENORS

On Petition to Review an Order of the
Federal Power Commission

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* * * *

Before MURRAH, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

Pan American Petroleum Corporation seeks review under section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), of an order of the Federal Power Commission wherein the Commission assumed juris-

diction under section 7 of the Act over a transaction between Pan American and Tennessee Gas Transmission Company, the latter company being an interstate natural gas pipeline company. The dispositive question is whether the subject transaction constituted an assignment of oil and gas leases and was thus exempt under section 1(b) of the Act,[1] FPC v. Panhandle Eastern Pipeline Co., 337 U.S. 498, or a sale of gas for resale in interstate commerce and so was under the regulatory cognizance of the Commission, Phillips Petroleum Co. v. Wisconsin, 347 U.S 672.

During the years 1954 through 1959 Pan American acquired twelve leases upon what was initially undeveloped acreage in what is now known as the Bastian Bay Field in Plaquemines Parish, Louisiana. In December, 1955, an exploratory well was completed and thereafter a total of 32 wells were drilled upon six of the leases by Pan American either as wholly owned wells or in conjunction with others sharing operating rights. No wells were drilled upon the other six leases. Although the field was proven, Pan American made no sales for consumption, did not connect the wells to an interstate transmission pipeline or collection facilities and did not establish any permanent production units. Such quantities of gas as were produced were flared or consumed in the field.

On December 1, 1960, Pan American conveyed its interests to Tennessee for a stated price of $159,463,500 pursuant to a contract designated as a Lease Sale Agreement and consummated by an "Assignment and Conveyance." Of this price, Tennessee paid

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[1] Section 1(b) provides, *inter alia*, that the Commission's jurisdiction shall not reach "facilities used for . . . the production or gathering of natural gas." 15 U.S.C. § 717(b)

$9,427,104 at the time of transaction and obligated itself for seventeen further annual payments evidenced by promissory notes. The agreed price was based upon estimated reserves and provided for redetermination of the reserves upon the request of either party between 1969 and 1973, and for adjustment of the purchase price on the basis of such determination. The pricing formula was equated to 21¢ per Mcf. for the reserves attributable to the interest assigned. Tennessee agreed to develop and produce the leases and to negotiate contracts with royalty owners for the payment of royalties and reimbursement of Louisiana severance taxes. And the assignment was subject to the following reservations: (1) Pan American retained its rights in minerals other than natural gas, oil, and other petroleum liquids; (2) Pan American retained its rights in the leases below the bottom of the deepest presently-known productive horizons; (3) Pan American reserved as a production payment all proceeds received by Tennessee from the sale of oil produced on the leased acreage, such payments to terminate when 85 per cent of the recoverable reserves of oil have been produced; (4) Pan American reserved a similar production payment for proceeds received by Tennessee from the sale of separator liquids, with detailed provisions relating to the deduction of Tennessee's costs and expenses; and (5) Pan American retained the right to process all gas produced from the assigned leaseholds, including that attributable to certain outstanding royalty interests, for recovery of natural-gas liquids, agreeing to pay Tennessee for plant losses and use of gas as fuel.

Approval of the transaction was neither obtained nor sought from the Federal Power Commission. In 1961, Tennessee constructed a 12-inch connecting

pipeline from the field to that company's main interstate transmission system. See Tennessee Gas Transmission Co. v. FPC, No. 7751, 10 Cir., this day decided.

In substance, the contractual provisions of the Pan American-Tennessee agreement are not legally distinguishable from those considered by the Fifth Circuit recently in Marr v. FPC, 336 F. 320. There, as here, the thrust of the Commission's argument to support its claim of jurisdiction lies in its conclusion that the ultimate benefit that accrues to Tennessee is the acquisition of dry gas; that the legal effect of an instrument should be determined from the actuality of the transaction; that Congress intended that the Commission have all necessary powers to regulate the sale of gas in commerce effectively and that, absent jurisdiction of the subject and similar transactions, a regulatory gap exists which defeats the intended purposes of the Commission's creation. Such arguments are but a denial of the Supreme Court decision in *Panhandle*, supra, and can find no comfort in that court's later decision in *Phillips*, supra. The basic distinction between conveyances relating to simple acreage and facilities for production and gathering, over which the Commission has no jurisdiction, and the sale of gas in interstate commerce, over which the Commission does have jurisdiction, is not determined by nor dependent upon the contemplated but unrealized benefit to the parties. The conveyance must trigger the sale of gas in interstate commerce, not just shade the background. Saturn Oil & Gas Co. v. FPC, 10 Cir., 250 F. 61, 68, cert. denied, 355 U.S. 956. And the parties may deliberately avoid the jurisdiction of the Commission by remaining beyond the bounds of interstate commerce or within the exception to the Commission's regulatory powers

in such commerce. Sunray Mid-Continent Oil Co. v. FPC, 10 Cir., 270 F. 404, 409.

Our inquiry, then, must determine whether the Pan American transfers were leases within the compulsion of *Panhandle*. We conclude, as did the Fifth Circuit in *Marr*, that the subject conveyances were leases and consequently not within the Commission's jurisdiction under section 7 of the Act but were exempt under section 1(b). We are in complete accord with the views expressed by Judge Rives in his able opinion in *Marr* and find them to be equally applicable to the case at bar.

The orders are reversed and the cause remanded to the Commission for further proceedings consistent with the views here expressed.

APPENDIX B

JUDGMENT

Thirty-Second Day, November Term, Wednesday, December 30th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders are reversed and the cause remanded to the Federal Power Commission for further proceedings consistent with the views expressed in the opinion of the court.

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